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No. 98-1649

In the Supreme Court of the United States

SEA-LAND SERVICE, INC., PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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1699

QUESTION PRESENTED

Whether under Section 7 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 907, an employer may be required to provide treatment chosen by an injured employee on the basis of reasonable and appropriate medical advice, even if forgoing that treatment would also be medically reasonable.

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OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. 11-19) is reported at 153 F.3d 1051. That court's order amending the original opinion and denying a petition for rehearing (Pet. App. 1-2) is reported at 164 F.3d 480. The opinion as amended (Pet. App. 2-10) is not yet reported. The notice of deemed affirmance by the Benefits Review Board (Pet. App. 20-21) and the decision and order of the administrative law judge (Pet. App. 22-47) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1998. A petition for rehearing was denied on January 12, 1999. Pet. App. 2. The petition for a

writ of certiorari was filed on April 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, provides compensation to covered employees for work-related injuries that result in disability (and to survivors if the injury causes death). 33 U.S.C. 908, 909. A covered employer must also provide medical treatment to an injured employee "for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. 907(a). An injured employee has the right to select his own physician, subject to certain restrictions. 33 U.S.C. 907(b)-(d). The Act requires the Secretary of Labor to "actively supervise the medical care rendered to injured employees," and grants her the "authority to determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished" under the Act. 33 U.S.C. 907(b); see also 20 C.F.R. Pt. 702, Subpt. D (Secretary's regulations governing medical care and supervision).[1]

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[1] Congress has committed administration of the LHWCA to the Secretary of Labor, who in turn has delegated primary responsibility for administering the Act to the Director of the Office of Workers' Compensation Programs (OWCP). 33 U.S.C. 939(a); 20 C.F.R. 701.202(a). The OWCP investigates claims, and in uncontested cases one of its District Directors (formerly known as Deputy Commissioners, see 20 C.F.R. 702.315) may issue awards. 33 U.S.C. 919(c) and (e); 20 C.F.R. 702.315(a). Any party may, however, obtain a hearing before an administrative law judge (ALJ), who will resolve contested issues and render a decision awarding or denying benefits. 33 U.S.C. 919(c)-(d); 20 C.F.R. 702.316, 702.331-702.351. An ALJ's decision is subject to review by the Department's Benefits Review Board, and the Board's de-

2. Respondent Amos injured his shoulders, back, and neck on July 25, 1990, while working for petitioner. Pet. App. 2-3, 25, 32. He received compensation under the Act for total disability until July 25, 1991, when he returned to work. On February 13, 1992, he again stopped work because of shoulder pain. *Id.* at 3, 26. Respondent's treating physician referred him to a surgeon, who examined him and recommended surgery on his shoulder. *Ibid.* Petitioner thereafter retained two other orthopedic surgeons, each of whom examined respondent and recommended against surgery. *Id.* at 4-5, 32-33. Petitioner then refused to authorize the surgery, and respondent requested a hearing under the Act. *Id.* at 5; see 33 U.S.C. 919(c); 20 C.F.R. 702.261-702.262.

After hearing the matter, an ALJ denied respondent's request that she order petitioner to provide the surgery. Pet. App. 22, 32-39, 47.[2] The ALJ reasoned that the recommendation against surgery by one of petitioner's surgeons, Dr. Sears, was more persuasive than the recommendation in favor of surgery by respondent's surgeon, Dr. Pedegana. *Id.* at 35. In the ALJ's

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cisions are subject to review in the courts of appeals. 33 U.S.C. 921(a)-(c).

[2] The ALJ determined that respondent had injured his shoulders and back in the 1990 accident, and she awarded him compensation for partial disability beginning on February 13, 1992; required the payment of certain other medical expenses; and rejected petitioner's argument that the accident had at most aggravated a pre-existing injury, so that part of the liability for disability benefits should be shifted to a fund administered by the OWCP. See Pet. App. 25-32, 39-46. Those aspects of the decision are no longer at issue. The Secretary participated in the proceedings before the ALJ only with respect to the aggravation issue.

view, Dr. Sears' recommendation reflected a "far fuller" physical examination and appreciation of respondent's medical history. *Id.* at 36. The ALJ also noted that Dr. Sears' evaluation was a year more recent than Dr. Pedegana's, and that Dr. Sears' deposition testimony was persuasive. *Id.* at 36-37. Considering "the relative probative and persuasive weight of the conflicting medical opinions," *id.* at 35, the ALJ concluded (*id.* at 47) that the shoulder surgery recommended by Dr. Pedegana was not "reasonable and appropriate medical treatment for the compensable industrial injury," and that the Act therefore did not require petitioner to provide it.

Respondent Amos sought review of the ALJ's decision before the Benefits Review Board. See 33 U.S.C. 921(b). In 1996, Congress directed that all appeals that had been pending before the Board for more than one year were to be deemed affirmed if the Board did not act on them by September 12, 1996. Department of Labor Appropriations Act, 1996, Pub. L. No. 104-134, Tit. I, 110 Stat. 1321-219; see also 33 U.S.C. 921 note (Supp. III 1997). The ALJ's decision in this case became final, under that provision, on September 12, 1996. Pet. App. 20-21. Respondent then sought further review in the court of appeals. See 33 U.S.C. 921(c).

3. The court of appeals reversed. Pet. App. 2-10.[3] The court recognized that it "must accept the ALJ's findings unless they are contrary to law, irrational, or unsupported by substantial evidence." *Id.* at 8. It concluded, however, that there was not "substantial evidence" to support the ALJ's determination that re-

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[3] The Secretary did not participate in the proceedings before the court of appeals.

spondent was not entitled to have petitioner provide the shoulder surgery recommended by Dr. Pedegana, on the ground that the recommendation was not medically "reasonable and appropriate." *Id.* at 7, 9-10.

The court first observed that, in determining an injured employee's entitlement to receive particular medical care under the Act, "a treating physician's opinion is entitled to special weight[,] * * * because he is employed to cure and has a greater opportunity to know and observe the patient as an individual." Pet. App. 8 (internal quotation marks omitted). The court further noted that the Act "requires that employers furnish medical care" to injured employees, and "specifically guarantees the right of employees to select their own doctors." *Ibid.* (citing 33 U.S.C. 907). Although the Secretary is authorized to "supervise" medical care rendered under the Act, and an employer "is not required to pay for unreasonable and inappropriate treatment," the court concluded that when an injured employee is "faced with two or more valid medical alternatives," he has the right to choose among the options "in consultation with his own doctor." *Id.* at 8-9.

Applying those principles to respondent Amos's case, the court noted that the differing medical opinions at issue were all rendered by well qualified physicians. Pet. App. 9. It reasoned further that although the doctors retained by petitioner had recommended against surgery, their opinions did not demonstrate that the contrary recommendation of the treating physician, Dr. Pedegana, was "unreasonable." *Ibid.* "To the contrary," one had agreed that surgery "might offer [respondent] some symptomatic relief," and the other had "acknowledged that his preference against surgery in [respondent's] case was not open-and-shut, but a judgment call." *Ibid.* Under those circumstances,

the court concluded, "the ALJ's choice of one reasonable option over the other was not hers to make. It was the patient's." *Ibid.* The court accordingly held that "[t]he ALJ's rejection of Dr. Pedegana's surgical recommendation as not reasonable and appropriate was not supported by substantial evidence," and it remanded the case to the ALJ "with instructions to grant [respondent's] request for surgery." *Id.* at 9-10.[4]

ARGUMENT

1. Petitioner argues (Pet. 10-18) that the decision below adopts a rule of law that is inconsistent with the "substantial evidence" standard of review and impermissibly "substitute[s] the court's view of the evidence for that of the ALJ" (Pet. 17). The court, however, explicitly acknowledged that an ALJ's findings of fact are conclusive "unless they are contrary to law, irrational, or unsupported by substantial evidence." Pet. App. 8. The court held only that there was not "substantial evidence" to support the ALJ's ultimate determination that the shoulder surgery recommended by Dr. Pedegana would not be a "reasonable and appropriate" medical treatment for respondent Amos's compensable injury. *Id.* at 9-10; see *id.* at 47 (ALJ's order).

On the record in this case, considered as a whole, that holding is unremarkable. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 487-488 (1951) ("substantial evidence" standard requires court to take into account the whole record, not merely the evidence that supports the determination under review). The LHWCA

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[4] The court also remanded for a redetermination of respondent's entitlement to temporary (and possibly permanent) disability benefits. Pet. App. 10. Petitioner does not challenge that aspect of the court's decision. See Pet. 9.

requires covered employers to provide covered employees with "such medical, surgical, and other attendance or treatment * * * as the nature of the injury or the process of recovery may require." 33 U.S.C. 907(a). As the court of appeals correctly noted (Pet. App. 9), that provision has been construed not to require employers to provide care or treatment that would be medically unreasonable or inappropriate. See, e.g., 20 C.F.R. 702.401 ("[m]edical care" includes treatment that is "recognized as appropriate by the medical profession"); *Ingalls Shipbuilding* v. *Director, OWCP*, 991 F.2d 163, 165 & n.6 (5th Cir. 1993). In this case, however, the ALJ did not question Dr. Pedegana's qualifications or credibility; make any factual finding that would necessarily undermine his medical conclusions (as, for example, by contradicting a factual assumption underlying his opinion); or conclude that his recommendation of surgery was in any way "unreasonable." To the contrary, it is undisputed that, as petitioner itself repeatedly emphasizes (Pet. 16-17), the contrary medical recommendations at issue in this case were *both* "reasonable": The different doctors whose opinions were sought simply differed on the ultimate "judgment decision" with respect to surgery. See Pet. App. 5 (quoting deposition of Dr. Sears). The court of appeals concluded that, under those circumstances, the ALJ (and the employer) could not properly deny coverage under Section 907 if the injured employee chose to follow the reasonable medical advice of his own physician, rather than the reasonable but different judgment of a physician hired by his employer.

As petitioner points out (Pet. 13), the LHWCA directs the Secretary to "actively supervise the medical care rendered to injured employees," and authorizes her "to determine the necessity, character, and suffi-

ciency of any medical aid furnished or to be furnished" under the Act. 33 U.S.C. 907(b). The Secretary has delegated that responsibility and authority, however, not to the Department's ALJs, but to the Director of the Office of Workers Compensation Programs, acting through District Directors and their designees. 20 C.F.R. 702.407.[5] The decision below sensibly leaves determination of the appropriateness of particular medical treatments in particular situations to case-by-case adjudication, in the absence of some actual exercise of the Secretary's supervisory authority (such as promulgation of a regulation reflecting a categorical determination that a specified course of treatment is not "necess[ary]," within the meaning of Section 907(b), to treat a particular condition). Nothing in the court's

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[5] Petitioner argues that determining "the reasonableness or necessity of medical treatment requires findings of fact and weighing of the evidence," and therefore falls "solely" within the province of ALJs. Pet. 13-14; but see Pet. App. 34 (describing petitioner's contention before the ALJ that "the District Director has sole authority to oversee the provision of medical care"). The nature and extent of an ALJ's authority to address such issues is a matter of dispute between the Secretary and the Benefits Review Board. See *Sanders* v. *Marine Terminals Corp.*, 31 Ben. Rev. Bd. Serv. (MB) 19 (Mar. 18, 1997). In any event, the decision below gives no indication that the court of appeals fails to recognize an ALJ's authority to weigh conflicting evidence and resolve disputes over factual matters such as the existence, nature, origins, and extent of an injury or disability, or the physical facts underlying medical opinions, or even over the mixed question whether a given medical recommendation is ultimately "reasonable" (as both opinions at issue in this case are conceded to be, see Pet. 16-17; Pet. App. 9). See, *e.g.*, Pet. App. 8 (stating standard of review); see also *Duhagon* v. *Metropolitan Stevedore Co.*, 169 F.3d 615, 618 (9th Cir. 1999) (recognizing general rule, discussed by petitioner (Pet. 15-16), that "[i]t is within the ALJ's prerogative, as finder of fact, to credit one witness's testimony over that of another").

present holding—that an employer is normally required to provide medically reasonable and appropriate surgery if the injured employee chooses to undergo it, even if it might be equally reasonable for the employee and his doctor to choose a different course—impinges on the Secretary's statutory prerogative to supervise the provision of care under the Act.[6] In the absence of any such interference, the court of appeals' application of legal standards under Section 907 to the facts of respondent's case does not warrant review by this Court.

2. Petitioner also argues (Pet. 18-22) that the decision in this case conflicts with decisions of other courts, because the court below has required ALJs deciding LHWCA cases to accept the medical opinion of an employee's treating physician unless that opinion is shown to be unreasonable. That contention misstates the holding in this case, which requires only that a covered employer pay for medical treatment desired by an injured employee on the basis of reasonable and appropriate medical advice, even if it might also be reasonable for another doctor to recommend against the same treatment. See Pet. App. 8-10. That rule does not, as petitioner suggests (see Pet. 21-22), require deference to a medical opinion simply because it is rendered by the employee's usual physician; indeed, it might require payment for care recommended by a doctor other than the usual physician, if the employee chose to follow the reasonable advice of a different doctor, perhaps consulted precisely in order to obtain a second opinion as to the best course of treatment. Nor does the court's rule require blind deference to *any*

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[6] The Secretary has not, for example, promulgated a regulation articulating a different set of principles to govern such situations.

medical opinion, because an employer always remains free to resist providing a requested treatment on the ground that it is medically unreasonable or inappropriate under the circumstances of a particular case. Pet. App. 9-10. All the court's decision protects is an injured employee's ability, when faced with alternative appropriate medical recommendations, to choose "one reasonable option over the other." *Id.* at 9; see 33 U.S.C. 907(a) (employer "shall furnish such * * * treatment * * * as the nature of the injury or the process of recovery may require"), 907(b) (subject to Secretary's supervision, "[t]he employee shall have the right to choose an attending physician").

The court of appeals' opinion does endorse the application, in LHWCA cases, of the principle that a "treating physician's" opinion should be "afford[ed] greater weight * * * because 'he is employed to cure and has a greater opportunity to know and observe the patient as an individual.'" Pet. App. 8 (quoting cases involving the Social Security Act). That reference to factors that will often make such an opinion especially probative is neither significantly different from petitioner's own statement that "a treating doctor's opinion is entitled to *due consideration*" (Pet. 22), nor inconsistent with petitioner's observation (*ibid.*) that the ultimate persuasiveness of such an opinion "depends on the extent to which it is supported by clinical findings." It is also consistent with the views of other courts of appeals that have considered the issue under the LHWCA. *Morehead Marine Servs., Inc.* v. *Washnock*, 135 F.3d 366, 371 (6th Cir. 1998) ("[g]enerally, an ALJ is entitled to give greater weight to the opinion of a treating physician than to that of non-treating physicians"); *Pietrunti* v. *Director, OWCP*, 119 F.3d 1035, 1042 (2d Cir. 1997) (in determining whether employee is medi-

cally disabled, ALJ is "bound by the expert opinion of a treating physician * * * 'unless contradicted by substantial evidence to the contrary'"); see also *Director, OWCP* v. *Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999) (recognizing authority against preferring opinion solely because it is that of a treating physician, but allowing greater weight where "the ALJ explained why more extended examination of the patient would render more reliable a doctor's assessment of the patient's subjective pain and its cause"). And it does not conflict with the decisions under the Black Lung Benefits Act cited by petitioner (Pet. 20-22), which hold only that "ALJs cannot afford more weight to an examining physician's opinion *solely* because that doctor personally treated the claimant." *Amax Coal Co.* v. *Beasley*, 957 F.2d 324, 327 (7th Cir. 1992); see also *Sterling Smokeless Coal Co.* v. *Akers*, 131 F.3d 438, 441 (4th Cir. 1997) (rejecting "*requirement* or * * * *presumption*," but recognizing that "as a general matter the opinions of treating and examining physicians deserve especial consideration"); cf. *Lango* v. *Director, OWCP*, 104 F.3d 573, 577 (3d Cir. 1997) (noting "some question about the extent of reliance to be given a treating physician's opinion where there is conflicting evidence"); compare *Thorn* v. *Itmann Coal Co.*, 3 F.3d 713, 717 n.3 (4th Cir. 1993) (report of treating physician, although not controlling, is entitled to "great weight"); *Patrich* v. *Old Ben Coal Co.*, 926 F.2d 1482, 1491 (7th Cir. 1991) (opinion of treating physician "could properly be accorded more weight than a determination of disability based upon an autopsy").[7] No

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[7] Petitioner also cites (Pet. 20-21) *Kreschollek* v. *Southern Stevedoring Co.*, 129 F.3d 1255 (3d Cir. 1997) (Table), *reprinted at* 31 Ben. Rev. Bd. Serv. (MB) 169 (CRT) (Sept. 30, 1997), which

court of appeals, including the court below, requires an ALJ deciding a case under the LHWCA to credit a treating physician's opinion or recommendation when the weight of the evidence shows that doing so would be unreasonable.

Even if there were a substantial conflict among the courts of appeals concerning the relative weight to be accorded, in the abstract, to the views of treating and non-treating physicians, this case would not be an appropriate vehicle for resolving it. The court below did not conclude that the opinion of respondent's doctor was *more* reasonable than that of the doctors engaged by petitioner, as a matter of "special deference" (Pet. 18; Pet. App. 9) or otherwise. To the contrary, the court concluded, as petitioner stresses (Pet. 16-17), that all the medical opinions at issue reflected reasonable medical judgments on the facts of respondent's case; and it held that respondent was therefore permitted to choose among those reasonable courses of treatment. See Pet. App. 9-10. Rejection of a "special deference" rule would accordingly have had no effect on the court of appeals' decision in this case, and the observations on that score in the opinion below provide no basis for review by this Court.

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involved the LHWCA. As petitioner acknowledges (Pet. 20-21), that decision is unpublished and "not of precedential value." In any event, it merely observes that the Third Circuit has not applied a rule of special deference to treating physicians under the LHWCA, and "arguably" has rejected its "blind" application "in favor of a preferred reliance on the reasoning underlying [the] conclusions of a treating, or any, physician." See Pet. 21 (quoting *Kreschollek*). The decision below does not purport to require a "blind" preference for one physician's opinion over another's, or to preclude inquiry into whether a treating (or other) doctor's medical advice is reasonable and appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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